No. 16-534

In The
Supreme Court of the United States

JENNY RUBIN, DEBORAH RUBIN, DANIEL MILLER, ABRAHAM MENDELSON, STUART HERSH, RENAY FRYM, NOAM ROZENMAN, ELENA ROZENMAN, and TZVI ROZENMAN,

Petitioners,

v.

ISLAMIC REPUBLIC OF IRAN, FIELD MUSEUM OF NATURAL HISTORY, and UNIVERSITY OF CHICAGO, THE ORIENTAL INSTITUTE,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

I. ONLY PETITIONERS' CONSTRUCTION OF THE STATUTE CAN EXPLAIN WHY SUBSECTION 1610(G) SUBJECTS "PROPERTY OF A FOREIGN STATE" TO EXECUTION

A. Iran And The Government Cannot Read Subsection 1610(g) Without Deleting The Phrase, "Property Of A Foreign State."

Subsection 1610(g) enables enforcement of judgments against ***both*** the property of a state sponsor of terrorism ***and*** the property of the state's agencies and instrumentalities. 28 U.S.C. § 1610(g). In the latter case, § 1610(g) partially abrogates *First National City Bank v. Banco Para el Comercio Exterior de Cuba*, 462 U.S. 611 (1983) ("*Bancec*") by enabling certain terrorism judgment creditors of the state to pierce the corporate veil and enforce their judgments against the assets of the state's juridically independent agencies and instrumentalities. But veil-piercing has no application to enforcement against the property of the state defendant itself. Had Congress enacted subsection 1610(g) with the sole purpose of abrogating *Bancec*, it would not have subjected the state's ***own*** property to execution.

Neither Iran nor the government can account for the inclusion of "property of a state" in subsection 1610(g). Instead, they argue that because a terrorism ***judgment*** under 28 U.S.C. § 1605A entered against the state is critical to execution upon the property of state-owned agencies, subsection 1610(g) had to

mention the sovereign judgment debtor itself. However, this evasion addresses the statute's reference to the judgment against the state; it does not, and cannot, account for subsection 1610(g)'s provision that "the ***property*** of a foreign state" (emphasis added), is subject to execution upon a section 1605A judgment.

If subsection 1610(g) merely abrogated *Bancec* it would have provided: "Subject to paragraph 3, the property of an agency or instrumentality of a foreign state against which a judgment is entered under section 1605A . . . is subject to attachment. . . . " According to respondents' construction, and that of the courts below, the statute's provision for execution upon "the property of a foreign state" is not only superfluous, but inapposite. Without an explanation for the inclusion of this phrase in the statute, Iran and the government simply read it out of the statute.

In subsection 1610(g), Congress clearly intended to permit execution of judgments against property of the state itself. And had Congress not intended to use subsection 1610(g) to expand the type of property subject to execution, it would have simply omitted from subsection 1610(g) any reference to the property of the state, and relied upon the existing execution immunity provisions, such as subsection 1610(a)(7). By including property of the state in subsection 1610(g), by not qualifying subsection 1610(g) with any commercial use restrictions, and by providing that property of the state is subject to execution upon a section 1605A judgment regardless of factors relating to the control, management, benefit, and use of the property, Congress

manifested its intent to enable section 1605A judgment holders to execute their judgments upon nearly all Iranian property.

B. The University's Attempt To Explain Subsection 1610(g)'s Reference To "Property Of A Foreign State" Backfires.

Unlike Iran and the government, the University of Chicago attempts to account for the inclusion of "the property of a foreign state." U.C.Br.35. The University speculates that Congress "might have" included that phrase in subsection 1610(g) to enable creditors to reach property belonging to the foreign state that is an interest held indirectly in a separate juridical entity controlled by a third party. The University's suggestion that the phrase "the property of a state" was intended to enable execution upon state-owned property controlled by a third party is a welcome concession. And it highlights the internal contradictions within the respondents' construction of subsection 1610(g).

Contrary to the implication of the respondents' arguments, the decisions below were ***not*** based upon a finding that the artifacts were not used for an activity of a commercial nature. Pet.App.16, 57 n.10. In fact, the nature of the use of the artifacts was "commercial" as that term of art is defined under the FSIA. *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607 (1992); *Malewicz v. City of Amsterdam*, 362 F. Supp. 2d 298, 314 (D.D.C. 2005) (lending art not a sovereign act, even if owned by a sovereign). Rather, the courts below held

that the "commercial use" referred to in subsection 1610(a) had to be use ***by the foreign state itself***.[1] Use by the University – a third-party – would not suffice. Pet.App.3, 57. And because the courts held that 1610(g) could only enable execution upon satisfaction of all the stringencies of subsections 1610(a)(7) and (b)(3), including, under subsection 1610(a)(7), that the foreign state ***itself*** use the property, the lower courts held that subsection 1610(g) did not apply.

But if the University is correct that the phrase, "the property of a foreign state" is intended to ensure judgment creditors can reach state-owned property that is controlled by an unrelated third party, then subsection 1610(g) would enable the petitioners to execute their judgment against the artifacts, which are directly owned by Iran but controlled by a third-party – the University. Thus, if the University is right, the Court should reverse the decision below and remand with instructions to make findings of fact as to whether the University's use of the property is "commercial" as that term is understood under the FSIA, or alternatively, whether subsection 1610(g)'s other provisions similarly override subsection 1610(a)'s requirements.

At a minimum, the University's hypothetical, which purports to explain the inclusion of "the property of a foreign state," demonstrates the impossibility of reconciling the stringencies of subsection 1610(a) with subsection 1610(g)'s provisions that property of a

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[1] Petitioners sought certiorari review of this holding, but this Court did not grant cert on that question.

foreign state is subject to execution regardless of whether the state manages or controls the property, or with the provision allowing execution upon property that is indirectly held in a separate juridical entity. *See* 28 U.S.C. § 1610(g)(1)(A), (C). In none of these instances is the foreign state itself using the property.

In short, if subsection 1610(a)(7)'s requirement that the use be made by the state itself trumps subsection 1610(g)'s leniencies, then many provisions of subsection (g) are meaningless, and the decision below should be reversed to avoid that result. And if subsection 1610(g) trumps subsection (a)'s strict requirements, then the very basis of the lower courts' holdings is negated, and the case should be reversed on that ground. The *Bennett* court noted these contradictions, and refused to resolve this "tension" by "read[ing] into § 1610(g) . . . limitation[s] that Congress did not insert." *Bennett v. Islamic Republic of Iran*, 825 F.3d 950, 960 (9th Cir. 2016). Instead, *Bennett* construed "property of a foreign state" to mean ***any*** property of a foreign state. And to avoid conflicting terms, *Bennett* held that execution of judgments under subsection 1610(g) was not dependent upon satisfaction of restrictions Congress did not include in that provision. *Id.*

The University next speculates that the phrase "the property of a foreign state" enables a judgment entered against one foreign state-owned agency to be enforced against the property of a different state-owned agency. U.C.Br.36. This "lateral enforcement" theory finds no support in the text of the statute. Subsection 1610(g)'s abrogation of *Bancec* does not completely

eviscerate the corporate form of state-owned agencies. It merely allows a judgment against the state to be enforced against the property of its agencies or instrumentalities. It does not allow a judgment against an agency or instrumentality to be enforced against the state, much less against a different agency or instrumentality. Veil piercing under subsection 1610(g) is a one-way street.

II. Respondents' Assertion That Subsections 1610(a)(7) And (b)(3) Are Superfluous Is Based Upon A Fundamental Misunderstanding Of Sections 1605A And 1610.

Unable to account for subsection 1610(g)'s allowing execution of "the property of a foreign state," respondents shift their focus and argue that if subsection 1610(g) enables execution of 1605A judgments against almost all property of the foreign state, then subsections 1610(a)(7) and 1610(b)(3), which are more limited enforcement provisions for terrorism cases, are rendered superfluous. Iran.Br.18; U.S.Br.25; U.C.Br.32-34. The respondents misconstrue and misunderstand the roles of each of these provisions. As the respondents themselves note, in 2012, Congress amended subsections 1610(a)(7) and (b)(3) to reinsert references to the former terrorism exception to jurisdictional immunity. However, Congress did not amend subsection 1610(g), which remained applicable only to judgments entered under the new section 1605A. The unavoidable implication of this disparity is that Congress intended the

different execution immunity exceptions to apply to enforcement of different types of judgments.

Prior to the enactment of section 1083 of the National Defense Authorization Act of 2008, the FSIA included a terrorism exception to jurisdictional immunity. *See* 28 U.S.C. § 1605(a)(7) (2007). Like the other jurisdictional immunity exceptions, the former terrorism exception did not include a private right of action. *Leibovitch v. Islamic Republic of Iran*, 697 F.3d 561, 564 (7th Cir. 2012). While the immunity exception opened the courthouse door to terrorism victims, Plaintiffs were required to identify a cause of action elsewhere, usually under state or foreign law. *Id.*

The pre-2008 FSIA also provided execution immunity exceptions for those plaintiffs who obtained terrorism judgments under their state or foreign law claims. These execution immunity exceptions were codified in former subsections 1610(a)(7) and (b)(2).[2] These subsections provided, respectively, that the property of a foreign state and the property of an agency or instrumentality of a foreign state were not immune from execution if, "the judgment relates to a claim for which" the foreign state or agency or instrumentality "is not immune" under the then-applicable terrorism jurisdictional immunity exception, subsection 1605(a)(7). Subsections 1610(a)(7) and (b)(2) both enabled enforcement of judgments on any ***claims for***

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[2] Subsection 1610(b)(2)'s terrorism exception was later renumbered 1610(b)(3).

which the foreign state, or its agency, or instrumentality ***were not immune***.

The jurisdictional immunity exception codified at 1605(a)(7) covered a large class of potential plaintiffs. It applied to plaintiffs in situations where ***either*** the victim or the claimant satisfied certain requirements, such as being United States nationals. *Leibovitch*, 697 F.3d at 564. This provision created an exception to jurisdictional immunity that enabled both United States nationals and their non-United States national relatives to sue foreign state sponsors of terrorism. *See id.* And if either type of plaintiff obtained a judgment, they could enforce it under subsection 1610(a)(7) or (b)(2).

In section 1083 of the NDAA of 2008, Congress overhauled the terrorism exceptions to foreign sovereign immunity with the express purpose of, among other things, creating new powerful remedies for victims of terrorism and significantly expanding the scope of foreign state property subject to execution of judgments. *Estate of Heiser v. Islamic Republic of Iran*, 807 F. Supp. 2d 9, 26 (D.D.C. 2011). Congress moved the former terrorism jurisdictional immunity exception from subsection 1605(a)(7) to new subsection 1605A(a). At the same time, Congress also created a new private right of action that included powerful new remedies. 28 U.S.C. § 1605A(c). While expanding the available remedies for terrorism victims, Congress restricted the private right of action in subsection 1605A(c) to a narrower class of plaintiffs than the jurisdictional immunity exception in subsection

1605A(a) (formerly subsection 1605(a)(7)). *Leibovitch*, 697 F.3d at 564; *Owens v. Republic of Sudan*, 864 F.3d 751, 806 (D.C. Cir. 2017). Specifically, the jurisdictional immunity exception continues to apply when either the claimant or the victim is a member of one of the defined groups of plaintiffs. In contrast, the private right of action is available only to plaintiffs who are themselves United States nationals, members of the armed forces, government employees or contractors, and legal representatives of one of the identified potential plaintiffs. 28 U.S.C. § 1605A(c). *Leibovitch*, 697 F.3d at 564; *Owens*, 864 F.3d at 806. The jurisdictional immunity exception accommodates claims brought under the new private right of action, and it continues to allow claims under other sources of law, such as state or foreign causes of action for plaintiffs who are not eligible to assert the private right of action.

Finally, in section 1083 of the NDAA of 2008, Congress amended subsections 1610(a)(7) and (b)(3) to enable enforcement of ***judgments*** entered on ***claims*** brought under subsection 1605A(a). The amendments to subsections 1610(a)(7) and (b)(3) were needed to provide an enforcement mechanism for those plaintiffs who were able to bring state or foreign law claims under the jurisdictional immunity exception but could not avail themselves of the private right of action in subsection 1605A(c).

NDAA section 1083 also added subsection 1610(g), which applies only to "judgments entered under section 1605A." 28 U.S.C. § 1610(g). The language of section 1610 compels the conclusion that subsection

1610(g) allows only enforcement of terrorism judgments by creditors who are among the narrower class of plaintiffs to whom the private right of action of 1605A(c) is available. Subsection 1610(a)(7) applies where the "judgment relates to ***a claim for which the foreign state is not immune*** under section 1605A or section 1605(a)(7)." Subsection (b)(3) uses the same language with respect to judgments against agencies or instrumentalities. Thus, by their express terms these subsections apply to ***any*** claims for which the foreign state ***is not immune*** – even claims brought under state or foreign law. In contrast, subsection 1610(g) is worded very differently, and provides for enforcement only of "judgments entered under section 1605A." Judgments are entered under claims. They are not entered under sovereign immunity exceptions. The only claim under section 1605A is the private right of action found in 1605A(c).

Additionally, subsection 1610(g) is limited to judgments "entered under section 1605A," whereas subsections 1610(a)(7) and 1610(b)(3) allow recovery for a broader group of plaintiffs whose judgments "relate[] to a claim for which the foreign state is not immune under section 1605A or section 1605(a)(7)." 28 U.S.C. § 1610(a)(7); *see also* 28 U.S.C. § 1610(b)(3) (same). The broader language of 1610(a) and (b) allows attachment whenever the plaintiffs rely on the immunity waiver in 1605A(a) regardless of whether the plaintiff employs the cause of action in 1605A(c). *See Stern v. Marshall*, 564 U.S. 462, 473-74 (2011) (in the bankruptcy context, distinguishing between the narrower category of

claims "*arising under* title 11" and the broader categories of claims "*related to* a case under title 11") (emphases added).

In addition to providing relief to the judgment creditors who can benefit from the immunity exception but not from subsection 1605A(c)'s private right of action, subsections 1610(a)(7) and (b)(3) were intended to enable other judgment creditors holding judgments that could not benefit from subsection 1610(g), such as those who held judgments under former subsection 1605(a)(7) that would not be converted to section 1605A judgments. Respondents claim this cannot be because, as originally amended, subsections 1610(a) and (b) referred only to claims that were not immune under section 1605A and omitted any reference to the former terrorism exception – 28 U.S.C. § 1605(a)(7). Iran.Br.39. But the respondents' construction of the 2008 amendments requires a holding that Congress intended to extinguish the enforcement rights of these holders of older judgments. This suggestion is preposterous given that Congress's express purpose in enacting section 1083 was to expand the remedies and enforcement options of terrorism victims. Congress's intent in the original amendments is also evident from its further amending these provisions in 2012 to reinsert references to the former jurisdictional immunity exception, which demonstrates that (a) Congress intended subsections 1610(a)(7) and (b)(3) to enable execution upon different judgments than those subject to execution under subsection 1610(g); and (b) Congress did not intend to extinguish

the enforcement rights of those holding judgments under claims brought pursuant to the former subsection 1605(a)(7) immunity exception.

III. The Respondents Attempt To Force Meaning Into Their Proposed Construction By Misconstruing The Phrase "As Provided In This Section."

A. The Respondents And The Government Distort The Meaning Of Subsection 1610(g) By Omitting Terms That Are Central To Its Meaning.

Subsection 1610(g) is an extremely powerful judgment enforcement provision, stripping all but a skeletal frame of execution immunity. To compensate, Congress deliberately limited the breadth of subsection 1610(g)'s application by restricting both the class of states to which it could apply and the class of plaintiffs who could invoke it. Congress effected both of these restrictions by conforming subsection 1610(g) to the private right of action of subsection 1605A(c). Depending upon a judgment entered under section 1605A's private right of action, subsection 1610(g) applies only to designated state sponsors of terrorism. For the same reason, the class of plaintiffs who may invoke this provision is limited to United States nationals, members of the armed services, government employees and contractors, and their legal representatives. 28 U.S.C. § 1605A(c). Thus, the centrality to subsection 1610(g) of the subsection 1605A(c) judgment cannot be overstated.

The respondents and the government assert that the meaning of subsection 1610(g) can be reduced to six words, separated by strategically-placed ellipses. They claim that the scope of 1610(g) is constrained by the words, "execution . . . as provided in this section," which limit execution to property otherwise available under the narrow terms of 1610(a)(7). U.C.Br.20; Iran.Br.22-24; U.S.Br.16. However, the respondents cannot read the statute in this way without removing the words, "under that judgment" – the 1605A judgment – from the center of that clause. This omission distorts the meaning of subsection 1610(g).

The phrase "as provided in this section" modifies the 1605A judgment, the last antecedent before that phrase. Additionally, the punctuation demonstrates that "as provided in this section" refers to the 1605A judgment, and not, as the respondents claim, "execution," which is separated with a comma from the phrase, "upon that judgment as provided in this section." The respondents invite the Court to elide the words "upon that judgment." Such a reading distorts the textual meaning of subsection 1610(g), which is explicitly tied to the 1605A judgment, and it distorts the meaning of the phrase, "upon that judgment as provided in this section," which emphasizes the centrality of the 1605A judgment.

The government asserts, "subsection (g) consists of one sentence with one subject." Gov.Br.13. But to restrict the "one sentence" to the narrow "one subject" of their own choosing, the government and respondents are forced to cut from the statutory text both the

reference to the foreign state's own property and the reference to the section 1605A judgment, both of which lie at the heart of subsection 1610(g). Thus, the government and the respondents do not construe subsection 1610(g) as "one sentence," but as one phrase interrupted by ellipses – "execution . . . as provided in this section." However, "[o]ne of the most basic interpretive canons is that a statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant." *Corley v. United States*, 556 U.S. 303, 314 (2009). The respondents and the government would have the Court violate this fundamental canon by deleting two of the central phrases of subsection 1610(g) – the reference to "the property of a foreign state" and "upon that judgment."

Additionally, there is no canon of statutory construction that a statute can give effect to only a single legislative purpose. But if subsection 1610(g) has only a single purpose, that purpose is "to make available for execution the property (whether or not blocked) of a foreign state sponsor of terrorism, ***or*** its agency or instrumentality, to satisfy a judgment against that state." *Bank Markazi v. Peterson*, 136 S. Ct. 1310, 1318 n.2 (2016) (emphasis added); *see also Bennett v. Islamic Republic of Iran*, 825 F.3d 950, 960-62 (9th Cir. 2016); Pet. App. 41 (Hamilton, J., dissenting); *Estate of Heiser v. Islamic Republic of Iran*, 807 F. Supp. 2d 9, 26 (D.D.C. 2011) ("a core purpose of [section 1610(g)] is to ***significantly expand*** the number of assets available for attachment in satisfaction of terrorism-related

judgments under the FSIA.") (emphasis added). The government substitutes its own narrow purpose as the "one subject" of subsection 1610(g). Then, to read the "one sentence" of subsection 1610(g)(1) to comport with the one subject, the government is forced to delete at least nine words from two different clauses of that one sentence (which contains 158 words).

Similarly, the respondents quote selectively from the legislative history under the same misapprehension – that legislation may give effect to only one purpose, and that Congress would not enact a law having broader effect than the narrowest possible construction that might give effect to that one purpose. *See* Iran.Br.29-30. While, as Iran observes, Senator Lautenberg said that the *Bancec* barrier was a motive for the legislation, he did not say that *Bancec* limits subsection 1610(g). On the contrary, Senator Lautenberg said that subsection 1610(g) would remedy the problem faced by plaintiffs who could not show that Iran exercised day-to-day managerial control over an asset owned by Iran through an Iranian bank. He said that subsection 1610(g) would remedy this obstacle "by allowing attachment of the assets of a state sponsor of terrorism to be made upon the satisfaction of a 'simple ownership' test." 154 Cong. Rec. S.55 (Jan. 22, 2008). Senator Lautenberg did not say that the legislation remedied the obstacle by allowing plaintiffs to pierce the corporate veil, which of course, it does. Rather, he said the legislation would enable attachment of an asset "upon the satisfaction of a 'simple ownership' test." *Id.* To ensure the legislation would, in fact, remedy the

Bancec obstacle, subsection 1610(g) was crafted to "eliminat[e] ***many of the barriers***" that prevented U.S. Citizens from enforcing their terrorism judgments. 151 Cong. Rec. 12869 (June 16, 2005) (emphasis supplied). Accordingly, Congress cast a wide net that was designed to go beyond mere veil piercing, and enable execution upon "any property in which the foreign state has a beneficial ownership." H.R. Rep. No. 110-477, 1001 (2007) (Conf. Rep.). On the same page that the Conference Report says that subsection 1610(g) is intended to reach ***any*** beneficial ownership interest, the Report clarifies that this does not include diplomatic property. *See id.* That the authors of the Report felt compelled to clarify that diplomatic property would not be subject to execution, indicates that subsection 1610(g) is not otherwise limited.

B. The Respondents And The Government Cannot Reconcile Their Own Reading Of The Phrase "As Provided In This Section" With Their Construction Of Subsection 1610(g).

Even after reducing the meaning of subsection 1610(g) to the single phrase "execution . . . as provided in this section," the respondents and the government cannot reconcile that phrase with a construction of subsection 1610(g) that would favor them. The respondents and the government object to the *Bennett* court's construction of subsection 1610(g) because it understood "as provided in this section" to refer to the other terrorism execution immunity exception,

subsection 1610(f). The respondents assert that subsection 1610(f) is a subsection, not a "section," and Congress would not have cross-referenced subsection (f) in this way. But the respondents and the government cannot even agree among themselves what the phrase "as provided in this section" means or how it operates; each claims that "as provided in this section" refers to different ***subsections*** within section 1610. However, almost none of the suggested cross-referenced subsections could possibly work together with the respondents' reading of subsection 1610(g).

The government concedes that when subsection 1610(g) allows "execution . . . as provided in this section" it does not really mean ***section*** 1610. Rather, the government claims that phrase refers only to ***subsections*** 1610(a)(7) and (b)(3). U.S.Br.15. The University does not even try to construe the clause as referring to section 1610 as a whole; it merely asserts that in this case, "as provided in this section" refers to ***paragraph (7) of subsection 1610(a)***. U.C.Br.23.

Iran, meanwhile, continues to maintain, that subsection 1610(g) cannot permit execution through subsection 1610(b)(3). Iran.Br.42-43. As it argued in *Bennett*, Iran continues to maintain that subsection (b)(3) is available only where a judgment is entered against the agency or instrumentality whose assets are to be seized. Iran's construction undermines the validity of the decision below. According to Iran, the court of appeals erred when it held that subsection 1610(g) can permit plaintiffs to pierce the corporate veil of foreign state agencies or instrumentalities

under subsection (b)(3). Veil piercing is only relevant where a judgment is entered against the state and the plaintiff seeks to enforce the judgment against the assets of the state's agency or instrumentality.

Without subsection (b)(3), under Iran's construction of subsection 1610(g)'s phrase, "as provided in this section" really means "as provided in *subsection* 1610(a)(7)." And the same objection to the *Bennett* holding which read that phrase to refer to *subsection* (f) would defeat the decision of the court below. Both constructions would limit "this section" to a single subsection.

Iran's attempt to avoid this result is utterly implausible. Iran argues that its agencies or instrumentalities ***could*** waive their foreign sovereign immunity, in which case, subsection 1610(b)(1) could theoretically work together with subsection 1610(g). Iran.Br.43. Similarly, Iran suggests that subsection 1610(d), which permits prejudgment attachment under very narrow circumstances, could also theoretically fit, assuming Iran would expressly waive its immunity. Iran.Br.43. Iran's suggestion that the four remaining designated state sponsors of terrorism would waive their immunity to allow enforcement of judgments by terrorism victims is not credible for at least two reasons: (a) if Iran were inclined to waive its immunity, we would not be here litigating this case because it would have paid the judgments or at least renounced its support of terrorism; and (b) the United States government rejects that possibility.

Iran also asserts that subsection (c) could work in tandem with subsection (g). Iran.Br.42-43. Subsection (c) requires judgment creditors to wait a "reasonable" amount of time and to provide notice of the judgment to the state debtor before initiating enforcement proceedings. It also requires a separate order permitting enforcement. By its terms, subsection (c) applies only to "attachment or execution referred to in subsections (a) and (b)." It does not mention attachment or execution referred to in subsection (g). Based upon this language, *Gates v. Syrian Arab Republic*, 755 F.3d 568, 576-77 (7th Cir. 2014), held that subsection 1610(c)'s "solicitous notice requirements" are not applicable to judgments enforced under subsection 1610(g).

Again parting ways with the government and the court below, Iran argues that the phrase "as provided in this section" could refer to other paragraphs within subsection 1610(a). Iran.Br.43. But Iran concedes that reference to these other paragraphs would be superfluous because they would be "subsumed within subsection (a)(7). Finally, Iran claims that subsection 1610(g) could work together with subsection 1610(f). But elsewhere in its brief Iran claims that this is impossible. Iran.Br.34-35.

If the Court were to adopt the respondents' reading of 1610(g) and the phrase "as provided in this section," the only provision of section 1610 that could possibly pair with subsection 1610(g) is subsection 1610(a). But even subsection 1610(a)(7) does not work because it contradicts several provisions of subsection 1610(g), as discussed above.

The respondents argue that subsection 1610(g) cannot provide an execution immunity exception because it does not use the words "shall not be immune." But subsection 1610(g)'s language matches the language of subsection 1610(f)(1), an undeniable immunity waiver that, like subsection 1610(g), uses the language "subject to" execution rather than "shall be immune." The Court has "never required that Congress use magic words." *FAA v. Cooper*, 566 U.S. 284, 291 (2012); *Sebelius v. Auburn Reg'l Med. Ctr.*, 568 U.S. 145, 153 (2013) (same).

Additionally, to ensure that subsection 1610(g) would be construed to both abrogate *Bancec* and allow execution regardless of whether the property satisfies the strict requirements of subsection 1610(a), Congress could not use the "shall not be immune" language. That wording would suggest the removal of an immunity barrier; it would not necessarily signal affirmatively that the execution should proceed. Indeed, even as subsection 1610(g) is written, Iran presented such an argument in *Bennett*. In the court of appeals, Iran denied that subsection 1610(g) abrogated *Bancec*, asserting that even if the 1610(g) *Bancec*-factors are considered, "nothing in 1610(g) prohibits courts from upholding an instrumentality's independent status on ***other*** grounds." *See* Iran.Br.44-45, *Bennett v. Islamic Republic of Iran*, No. 13-15442 (9th Cir. Oct. 9, 2013) (emphasis in original). The court of appeals correctly rejected Iran's argument. *Bennett v. Islamic Republic of Iran*, 799 F.3d 1281, 1286-87 (9th Cir. 2015). But had 1610(g) used the language "shall not be immune,"

Iran's argument would have had more force. By stating that property of the state and property of the instrumentalities is subject to execution, Congress made clear that it was not merely removing a single barrier to execution, but affirmatively providing that execution should proceed.

Respondents argue that Congress drafted section 1083 *as an insert* to the previously enacted section of the U.S. Code, and that "section" therefore refers to a section of the U.S. code, not the public law. U.S.Br.19-20; Iran.Br.35. But early drafts of section 1083 used the parallel terms "a judgment entered under this section" at the beginning of subsection 1610(g)(1) and "execution upon that judgment as provided in this section" at the close of subsection 1610(g)(1). *See* H.R. 1585 Senate Amendment, 110th Cong. § 1087 (Oct. 1, 2007). As respondents observed, the first reference was changed to "a judgment entered under section 1605A." The second reference, almost surely through a scrivener's error, was left unchanged. "Correcting a scrivener's error is within this Court's competence." *Dir., Office of Workers' Comp. Program v. Newport News Shipbuilding & Dry Dock Co.*, 514 U.S. 122, 142 (1995) (Ginsburg, J., concurring). Reading "this section" to refer to a "judgment as provided in section 1605A" restores the parallel construction and advances a rational congressional policy linking liability and recovery for American plaintiffs suing state sponsors of terror.

IV. An Expansive Construction Of Subsection 1610(g) Is Consistent With The Restrictive Theory Of Foreign Sovereign Immunity And Would Not Violate International Law.

The respondents assert that giving effect to subsection 1610(g) as written would violate international law and basic principles of foreign sovereign immunity. Iran.Br.49; U.C.Br.38. As discussed in the petitioners' Brief (Pet.Br.53-54), Congress deliberately left intact the immunity of core sovereign-use property, such as diplomatic, military, and certain central bank assets. *See, e.g.*, *Bank Markazi*, 136 S. Ct. at 1318 n.2 (central bank assets remain immune); *Heiser*, 807 F. Supp. 2d at 19 n.7 (diplomatic assets remain immune). By protecting these types of sovereign property, subsection 1610(g) manifests the restrictive theory of foreign sovereign immunity, appropriately calibrated to address the unique circumstances presented by designated state sponsors of terrorism. Pet.Br.53.

Moreover, international law is unsettled regarding applications of the restrictive theory. The only international agreement on foreign sovereign immunity in force is the European Convention on State Immunity. *See* Carmen-Cristina Cirlig, European Parliamentary Research Service, *Justice Against Sponsors of Terrorism: JASTA and its International Impact* at 3 (Oct. 2016). That agreement has been ratified by only eight states. *Id.* Likewise, states differ in their application of the distinction between sovereign and private acts, acceptance of a tort exception, and recognition of an immunity exception for *jus cogens* violations, including

human rights violations, international crimes, and terrorism. *Id.*

Canada, for example, has enacted the Justice for Victims of Terrorism Act (the "JVTA"), S.C. 2012, c. 1, s.2 (2012), which, among other things, provides a private right of action for victims of terrorism that allows them to sue for any loss or damage from "a foreign state whose immunity is lifted under section 6.1 of the State Immunity Act." *Id.* s.4(1). The Canadian State Immunity Act enables victims to enforce their terrorism judgments against the property (including non-commercial property) of the identified state supporters of terrorism. R.S.C., 1985, c. S-18. The JVTA also provides for recognition and enforcement of foreign terrorism judgments. *Id.* s.4(5).

The Canadian execution immunity exception reaches beyond even the most expansive reading of subsection 1610(g). For example, in *Tracy v. Iran*, 2017 ONCA 549 (Court of Appeal for Ontario 2017), the court permitted victims holding section 1605A judgments against Iran to enforce their American judgments against Iranian property in Canada, including assets alleged to have been diplomatic property. Nonetheless, the court approved a pre-judgment attachment order, the recognition and enforcement of the American judgments, the removal of Iranian foreign sovereign immunity, the execution of the judgments against Iranian assets located in Canada, and the entry of an order awarding costs to the judgment creditors. The Canadian court also upheld these orders

notwithstanding Iran's assertion that the enforcement of the judgments was in violation of international law.

V. Execution Of Terrorism Judgments Against The Persepolis Collection Assets Is Not Foreclosed Under Any Principle Of Foreign Sovereign Immunity Or Other Federal Law.

The respondents attempt to manipulate the Court's construction of subsection 1610(g) with the lament that if petitioners prevail Iran will be denied its "patrimony." But Congress has twice enacted provisions governing the scope of immunity afforded to culturally significant objects. Neither protects the artifacts here. ***First***, the Immunity From Seizures Act, 22 U.S.C. § 2459, enables lenders of culturally significant objects to American institutions to seek and obtain legal immunity for those objects under circumstances not relevant in this case. ***Second***, just last year, Congress amended the FSIA to provide that where section 2459 is satisfied, the temporary display of cultural objects loaned by foreign states "shall not be considered to be commercial activity by such foreign state for purposes of subsection [1605](a)(3)." 28 U.S.C. § 1605(h) (2016).

These statutes reflect Congress's considered decision that (a) cultural objects are not presumed to enjoy immunity regardless of whether they are a foreign state's "patrimony"; (b) cultural objects may be granted immunity under specified conditions and only upon prior request; (c) the display of cultural objects by

American cultural or educational institutions ***is*** "commercial activity" in the absence of subsection 1605(h)'s fictitious declassification; and (d) subsection 1605(h)'s limited protection applies only to the expropriation immunity exception of subsection 1605(a)(3), and even then, it does not apply to Nazi-era or similar expropriations that target vulnerable groups.

Congress clearly delineated the bounds of immunity for cultural objects, and that immunity does not apply here. Additionally, the terms of subsection 1605(h) belie the respondents' assertions that the property at issue here was not used for commercial activity. Thus, construing subsection 1610(g) to allow execution upon the artifacts would merely apply enforcement rights enabling execution of the section 1605A judgment against Iran's property that was used by a third party for commercial activity. Regardless of how the Court construes subsection 1610(g), the immunity Congress has extended to culturally significant objects will remain unaffected. Additionally, virtually all cultural loans are, and will remain, eligible for immunity under section 2459.

Iran has both claimed responsibility for, and attempted to justify, its role in this attack and countless others. Now, demonstrating that its barbarism is matched by its *chutzpah*, Iran asks the Court to save its "patrimony" from its victims. Through its acts of terrorism and refusal to pay a valid judgment, Iran has placed its artifacts at risk. Iran ***can*** pay the judgment and redeem the artifacts; until now, it has simply refused to do so. But, if the petitioners prevail, the

likelihood that Iran would redeem its artifacts by simply paying the judgment is high. And, the prospect that Iran will elect to allow its artifacts to be sold by a court-appointed receiver (as petitioners requested below) should be of no concern to the Court. Rather, the Court must decide whether Congress intended to let Iran off the hook or to hold its feet to the fire. As the dissent below cautioned: "We should not attribute to Congress an intent to be so solicitous of state sponsors of terrorism, who are also undeserving beneficiaries of the unusual steps taken by the Rubin panel." Pet.App.42.

CONCLUSION

The Court should reverse the Seventh Circuit's holding as to subsection 1610(g) with instructions to enter judgment in favor of the petitioners and appoint a receiver to identify an appropriate purchaser who will ensure the artifacts are treated appropriately, or in the alternative, based upon the University's argument, reverse the decision below and remand with instructions to make findings of fact as to whether the University's use of the property is "commercial" and

whether subsection 1610(g)'s provisions override or limit other requirements of subsection 1610(a).

Respectfully submitted,

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